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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL DRIVERS, WAREHOUSEMAN AND HELPERS, LOCAL UNION NO. 89, *Petitioner*

v.

C. W. MOORE, *et al*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

DAVID PREVIANT,
511 Warner Building
Milwaukee 3, Wisconsin
HERBERT S. THATCHER,
DAVID S. BARR,
1009 Tower Building
Washington 5, D.C.
RALPH H. LOGAN,
506 West Jefferson Street
Louisville 2, Kentucky
Counsel for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	
A. The Facts	4
B. The Proceedings Below	8
Reasons for Granting the Writ	11
Conclusion	25
Appendix A	1a
Appendix B	17a

CASES CITED

Aeronautical Industrial Dist. Lodge 727 v. *Campbell*, 337 U.S. 521 (1949)	13, 23, 24
Allen v. *Teamsters Local 820*, 185 F.Supp. 492 (D. C. N. J. 1960)	16
Angel v. *Bullington*, 330 U.S. 183 (1947)	18
A. O. Smith Corp., 119 NLRB 621	14
Association of Westinghouse Salaried Employees v. *Westinghouse Elec. Corp.*, 348 U.S. 437 (1955)	20
Atkinson v. *Sinclair Refining Co.*, 8 L ed 2d 462 (1962)	16, 18, 19
Atlantic Coast Line R.R. v. *Burnette*, 239 U.S. 199 (1915)	18
Balaban & Katz, 87 NLRB 1071	22
Brown v. *Gerdes*, 321 U.S. 178 (1944)	17
Charles Dowd Box Co. v. *Courtney*, 7 L ed 2d 483 (1962)	19
Conley v. *Gibson*, 355 U.S. 41 (1957)	23
Copra v. *Suro*, 236 F2d 107 (1st Cir. 1956)	16

Page

Dice v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) 17

Engel v. *Davenport*, 271 U.S. 33 (1926) 18

Evening Star Newspaper Co. v. *Columbia Typographical Union*, 141 F.Supp. 374 (D.D.C. 1954), aff. 233 F2d. 697 (D.C. Cir. 1956) 16

Fagan v. Pa. R.R., 173 F.Supp. 465 (M.D. Pa. 1959) 24

Falsetti v. *Local 2036, United Mineworkers*, 46 LRRM 2389 (Pa. S. Ct. 1960) 19

Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) ... 13, 20, 23, 24, 25

Garner v. *Teamsters*, 346 U.S. 485 (1953) 18

Gateway Transportation Co., 137 NLRB No. 186 14

Gonzales v. *Machinists*, 356 U.S. 617 (1958) 20

Hardcastle v. *Western Greyhound Lines*, 303 F2d 182 (9th Cir. 1962) 24

Holman v. *Industrial Stamping & Mfg. Co.*, 142 F.Supp. 215 (E.D. Mich. 1956) 16

Hughes Tool Co., 104 NLRB 318 14

Hughes Tool Co., 23-CA-1432 (1962) 15

J. I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 19

Kent v. *CAB*, 204 F2d 263 (2d Cir. 1953) 24

Larus & Bro. Co., 62 NLRB 1075 ..... 14, 20

Local 174, Teamsters v. *Lucas Flour Co.*, 7 L ed 2d 593 (1962) 16, 17, 18, 19

McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) 17

NLRB v. *Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957) 22

NLRB v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959) 24

Pittsburgh Plate Glass Co., 111 NLRB 1210 14

Railroad Labor Executive Assn. v. *U.S.*, 339 U.S. 142 (1950) 24

Page

Retail Associates, Inc., 120 NLRB 388 22

San Diego Bldg. Trades Local 2020 v. *Garmon*, 359 U.S. 236 (1959) 13

Schatte v. *Stage Employees & Moving Picture Machine Operators*, 84 F.Supp. 669 (S.D. Calif. 1949), aff. 182 F2d 158, cert. den. 340 U.S. 827 16

Sinclair Refining Co. v. *Atkinson*, 8 L ed 2d 440 (1962) 19

Smith v. *Evening News Ass'n*, cert. granted 7 L ed 2d 793 (1962) (No. 89, 1961 Term) 15

Spielberg Mfg. Co., 112 NLRB 1080 14

Starke v. *N.Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950) 24

Steele v. *Louisville and Nashville R.R.*, 323 U.S. 192 (1944) 23

Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 16, 18, 19

Tunstall v. *Brotherhood of Locomotive F & E*, 323 U.S. 41 (1957) 23

United States v. *Lowden*, 308 U.S. 225 (1939) 24

United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960) 21

United Steelworkers v. *Enterprise Corp.*, 363 U.S. 593 (1960) 21

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) 21

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GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, *Petitioner*

v.

C. W. MOORE, *et al, Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Kentucky Court of Appeals, entered February 13, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky is reported at 356 S.W.2d 241 and is attached hereto, together with the Orders issued by that Court, as Appendix "A". The Orders and opinion of the Jefferson Circuit Court, Chancery Branch, First Division are unreported and are attached hereto in Appendix "B".

JURISDICTION

The judgment and order of the Kentucky Court of Appeals was entered on February 13, 1962, and a Petition for Rehearing was denied on May 4, 1962, making such judgment final. Thereafter, petitioner filed in this Court a timely application for extension of time, which application was granted by the Order of Associate Justice Potter Stew-

art, dated July 17, 1962, extending the time for the filing of this Petition to and including September 4, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a state court's jurisdiction over a cause of action against a labor organization for its alleged improper and discriminatory representation of certain employees in an arbitration proceeding is preempted by the exclusive jurisdiction of the National Labor Relations Board, in that the alleged conduct is arguably prohibited by Sections 8 and 9 of the National Labor Relations Act.

2. Whether a state court suit brought by individual employees against a labor organization and an employer, parties to a collective bargaining agreement, to enjoin their enforcement of an arbitration award rendered pursuant to such agreement, is one within the purview of Section 301 of the National Labor Relations Act so as to require the application of federal labor law as the basis of decision.

3. Whether individual employees have standing to bring a Section 301 suit, as aforesaid, in the state courts, although precluded by the statute itself from maintaining such suit in the federal courts.

4. Whether a state court exceeded its jurisdiction and acted contrary to and inconsistently with the national labor policy as established by decisions of this Court under Sections 7, 8, 9 and 301 of the Labor Management Relations Act, in having set aside an arbitration award on the grounds (1) that the arbitration committee had erroneously interpreted a collective bargaining agreement, (2) that the terms of an agreement covering a multi-employer bargaining unit were applicable to the employees of only one and not all of the employers in that unit, and (3) that the union had inadequately represented certain employees in the bargaining unit.

STATUTES INVOLVED

The National Labor Relations Act, 61 Stat. 156, 29 U.S.C. 151 et seq.

Section 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8: (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly

required as a condition of acquiring or retaining membership;

Section 9:

"Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...".

Section 301:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in the district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT

A. The Facts

The petitioner (defendant-appellee below), General Drivers, Warehousemen and Helpers, Local Union No. 89, (hereinafter referred to as "Local 89"), is an unincorporated association and labor organization representing

employees for the purpose of collective bargaining and is affiliated with the National Truckaway and Driveaway Conference (hereinafter called the "National Conference") and with the International Brotherhood of Teamsters. (R.6).

Dealers Transport Company (herein called "Dealers"), also a defendant-appellee below, is a corporation of the State of Tennessee, having offices at Louisville, Kentucky, and operating a trucking business primarily throughout the southern portion of the United States. (R. 6, 36, 166). E & L Transport Company (herein called "E & L"), not a party hereto, is a Michigan corporation having offices at Louisville, Kentucky, and operating a trucking business there and in other parts of the United States. (R. 7, 166).

Respondents here, plaintiffs-appellants below, as a class, are employees of Dealers and members of Local 89. (R.5).

Local 89 has been certified by the National Labor Relations Board to represent the employees of both Dealers and E & L and other companies, all of whom are members of a multi-employer bargaining unit. Identical contracts between the employers and the unions are negotiated and concluded on behalf of the unions by the National Conference, and on behalf of the employers by the Automobile Transporters Labor Division. (R. 19, 252-253, 263). The current agreement, known as the "Automobile Carrier Truckaway Agreement," covers the period of March 1, 1961 through February 29, 1964. Both Dealers and E & L are signatories to the Agreement. (R. 19, 263).

The said Agreement provides, in Article 1, Section 1, that the employer will recognize the National Conference, on behalf of its member locals, as the exclusive representative of all employees. (R. 19, K. 3).[1] Article 4, which involves seniority rights of employees, provides: "Any controversy over the employees' standing on such lists shall be sub-

[1] The designation "R. 19" refers to the record page to which the contract is attached. "K. 3" refers to the page in the contract where the provision cited appears.

mitted to the joint grievance procedure (ARTICLE 7)." (R. 19, K. 11). Section 5 of Article 4 states as follows:

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. (ARTICLE 7). (R. 19, K. 14).

Article 6 establishes a Local Joint Committee and a Joint Conference Committee, each composed of both union and employer representatives, for the purpose of settling disputes. (R. 19, K. 19-20). Article 7 provides that neither the union nor the employer may resort to strike, lock-out or other self-help devices "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (R. 19, K. 20). The grievance procedure calls for the following steps: initial settlement between the employer and union, followed by submission to the Local Joint Committee, appeal to the Joint Conference Committee and, finally, submission to an impartial board of arbitration. A decision at any step is to be final and binding upon the parties. It is further agreed that all matters of interpretation of the Agreement must be submitted for decision to the Joint Conference Committee. (R. 19, K. 21-23).

The principal business of both Dealers and E & L in Louisville was carrying automobiles for the Ford Motor Company. In 1961, due mainly to increased "piggy-back" activity by the railroads, Ford informed these companies that only one of them was needed to carry on the operation. Accordingly, Dealers and E & L agreed that Dealers would purchase E & L's "secondary authority" in the South, and E & L in turn would purchase Dealers' "initial authority" out of Lorraine, Ohio along with certain physical assets there. Thus, each company would consolidate its operations

geographically. To accomplish these objectives, the companies filed applications with the ICC, which applications are now pending. (R. 162-173).

When in August, 1961, the E & L employees at Louisville heard of this agreement, they filed a grievance with Local 89, claiming that pursuant to Article 4, Section 5 of the collective bargaining agreement, *supra*, they were entitled to be employed by Dealers, upon the consummation of the acquisition, while retaining the seniority they had enjoyed at E & L. They therefore contended that upon the absorption by Dealers of E & L's secondary authority at Louisville the seniority boards of the two companies should be merged. This process, whereby the seniority of separate groups of employees is merged on a single list, is commonly known as "dovetailing" of seniority. (R. 7, 240, 269). Local 89 carried the grievance to the Local Joint Committee where the matter was "deadlocked" by unanimous vote for submission to the Joint Conference Committee. (R. 186, 213, 240-243, 269-271). During the pendency of this grievance, and before learning all the facts surrounding it, Leslie Atterbury, Local 89's business agent, had told Dealers employees that the E & L employees would not succeed and that they had nothing to worry about. Apparently, until the Dealers employees got to Detroit before the Joint Conference Committee, they thought that Local 89 favored them in this dispute. (R. 115, 132, 210).

On October 18, 1961, the grievance was heard by the Joint Conference Committee in Detroit. Paul Priddy, Local 89's president and a member of this Committee, withdrew from the panel and did not participate in the decision because he wished to present his point of view to the Committee and because the grievance had arisen in his jurisdiction. Mr. Priddy presented the facts to the Committee and recommended that the seniority lists be dovetailed, since he felt that such action would in the long-run aid the larger part of the working force, including the Dealers employees who stood to be hurt at present. He pointed out that if the

seniority is not dovetailed, the E & L employees—most of whom had greater seniority than the Dealers employees—would go to the bottom of the list at Dealers thus losing credit for many years of service within the bargaining unit. (R. 220, 229-230, 270-271, 273-274, 282-284). According to Priddy, he entertained no prejudice against either Dealers employees or E & L employees, both of whom he represented. (R. 267-268). Mr. Snipes,[2] a Dealers official, also made a statement to the Committee, outlining the details of the Dealers—E & L agreement. (R. 170). The Dealers faction was represented at the hearing by three union shop stewards, who had been elected to that post by the Dealers employees. These three, although bitterly disappointed at Mr. Priddy's stand, spoke up for their cause. Their expenses for the trip were paid by the union. (R. 114, 121-122, 129-131, 143-144, 149, 230, 262). At that time, they raised no objections as to inadequate representation. (R. 143-144).

Thereafter, the Joint Conference Committee issued a unanimous decision, ordering the merger of seniority boards of Dealers and E & L within thirty days. (R. 322). Following the decision, and during the trial below, Dealers began to comply with the award while E & L continued to operate in Louisville with 25 to 30 men—pending decision on their applications to the ICC. It was assumed that, pursuant to the Committee award, E & L would employ the Dealers employees at Lorraine, Ohio, on the same seniority arrangement. (R. 140, 164, 171, 173, 246, 168).

B. Proceedings Below

C. W. Moore, an employee of Dealers, instituted a class suit for himself and about 300 other employees similarly situated against Local 89, the International Brotherhood of Teamsters, and Dealers in the Jefferson Circuit Court, Chancery Branch, First Division in Kentucky. Count I of the complaint alleged that plaintiffs had relied on the union

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[2] "Snipes" is referred to as "Snites" in the Record.

to present their case through the grievance process; that the union had deceived them and failed to represent them; that the decision of the Joint Conference Committee was "contrived" by the union; that the said decision was arbitrary and capricious and in violation of the collective bargaining agreement; and that plaintiffs, having lesser overall seniority than E & L employees, were being deprived of their jobs by the decision. Accordingly, Count I sought to enjoin enforcement of the Committee's ruling by Dealers and the Union. Count II repeated the above and, as an alternative to injunction, sought damages in the amount of $6,625,000. (R. 5-33).

Upon issue being joined on the pleadings, plaintiffs moved for a temporary injunction. (R. 39). Thereafter, by direction of the court, plaintiffs filed an amended complaint adding as defendants several E & L employees, representing that faction. (R. 43). The defendant International moved to quash the summons and dismiss the complaint as to itself. (R. 52). Your petitioner, defendant Local 89, moved to dismiss for failure to state a cause of action. On these motions, and later on the merits of the case, several hearings were held and testimony taken during the months of November and December, 1961, before Judge Macauley L. Smith. At the start of the hearings, counsel for defendant unions questioned the jurisdiction of the court on the ground that jurisdiction lay exclusively in the NLRB. (R. 107-108). On November 24, the judge issued an order granting the motion of the International to quash summons, and denying plaintiffs' motion for an injunction. In its accompanying opinion, the court upheld the ruling of the Joint Conference Committee, refusing to find that the Dealers employees had been inadequately represented at the hearing and that the award contravened the contract. (R. 55-57, App. B).

Plaintiffs appealed this decision to the Kentucky Court of Appeals. (R. 61). On November 29, that court sustained the appeal and ordered the issuance of a temporary injunction against enforcement of the award. (R. 63). There-

after, pending consideration of the merits by the trial court, defendant E & L employees moved to dismiss for failure to state a cause of action. (R. 68). Defendant Local 89 moved to dismiss on the ground of NLRB preemption of jurisdiction. (R. 69). On December 4, 1961, the trial court entered its judgment dismissing the complaint, and denying plaintiffs' motion for permanent injunction, on the same grounds previously stated by it. (R. 70, App. B). Plaintiffs again appealed to the Court of Appeals, moving that court to advance the case and to hear oral argument. (R. 72, 77). The court granted the motion to advance but overruled the request for oral argument, and on December 15 the case was ordered submitted on the record and briefs. (R. 78, 79).

Citing and quoting from appropriate decisions of this Court, petitioner in its brief to the trial court and the court below argued the limited scope of judicial review as to questions of arbitrability of grievances and validity of arbitration awards, noted that federal agencies and courts have consistently approved the contractual dovetailing of seniority and upheld the union's authority in such matters, pointed to the necessary applicability of federal law, contended that individual employees do not have a cause of action for breach of collective bargaining agreements, and reiterated the argument that NLRB jurisdiction is exclusive in the premises. (Br. 16-23).[2]

On December 15, the same day it ordered the case submitted on briefs, the Court of Appeals reversed the decision of the trial court, and made permanent its previously issued temporary injunction, noting that an opinion would be rendered later. (R. 80, App. A.). Local 89 made a motion to set aside the above order and submitted a memorandum on the question of jurisdiction, which was answered by plaintiffs. (R. 81, 82).

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[2] The designation "Br. 16-23" refers to the original brief filed by petitioner in the courts below, which appears in a volume of the Record separately certified by the court below and headed "Original Briefs".

On February 13, 1962, the Court of Appeals rendered an opinion wherein it appears that its order was based on the grounds that the Committee's interpretation of the collective bargaining agreement was erroneous, that the Dealers and E. & L contracts were independent of one another and the latter's employees could have no rights under the former's contract, that the union did not adequately represent Dealers employees and that, for all these reasons, the grievance was not arbitrable and the award was "arbitrary and violative of natural justice." The court also rejected the preemption argument, based on the exclusive jurisdiction of the NLRB.[4] Two judges dissented without opinion. (R. 84-94, App. A). An order was entered in accordance with the opinion. (R. 83, 94, App. A). Local 89 filed a timely petition for rehearing on March 16, 1962. (R. 96). In said petition, Local 89 argued that the court's opinion was inconsistent with this Court's decisions restricting the scope of judicial review in matters of arbitration, that the court should have applied federal law, that its decision had the effect of destroying the multi-employer bargaining unit protected by federal law, and that the court's jurisdiction was federally preempted. (R. 97, Pet. 6-17). On May 4, 1962, the petition was denied and the court's opinion was modified, but in no material respect. (R. 98, App. A). Thereafter, petitioner filed in this Court a timely application for extension of time, which application was granted by the Order of Associate Justice Potter Stewart, dated July 17, 1962, extending the time for the filing of this Petition to and including September 4, 1962.

REASONS FOR GRANTING THE WRIT

I

The instant case presents several issues of special interest and importance in the administration of the National

[4] It did, however, uphold the dismissal of the complaint as to the International Brotherhood of Teamsters because of its insufficient "connection with the controversy."

Labor Relations Act. Preliminarily, the case involves a question of the jurisdiction of a state court to adjudicate issues of alleged improper representation of employees in an arbitration proceeding by the union certified as their bargaining representative under the National Labor Relations Act, resulting in alleged job discrimination against such employees. In the instant case, the state court assumed such jurisdiction although the National Labor Relations Board has on various occasions afforded remedies for this same type of conduct under both Sections 8 and 9 of the Act. Next, even if it had jurisdiction, the court below erred in failing to recognize that this case is within the purview of, and of a kind covered by, the Labor Management Relations Act, particularly Section 301 thereof, therefore requiring the application of federal, not state, law. Moreover, the case presents the issue of whether individual employees may maintain suits of a kind covered by Section 301 in the state courts although precluded by that Section from doing so in the federal courts. This federal question, of substantial importance to the national labor policy and federal-state relations, has not heretofore been determined by this Court and should now be decided. Finally, as to each and every ground relied upon by the court below, its decision was inconsistent with governing federal law as enunciated by this Court.

As developed hereafter, the need for a proper administration of Section 301 of the Act, a continuing and consistent development of the national labor policy and a determination of the proper role of the state courts in enforcing federally created rights gives ample reason for the granting of this Writ.

II

In their complaint plaintiffs allege that they had trusted the "integrity and fairness" of the Union and had been disappointed in that trust; that the Union had misinformed them as to their representation at the arbitration hearing and, having deceived them, left them without representation; that the decision of the Committee was "contrived"

by the Union and was thus arbitrary and capricious and deprived them of their contractual rights; and that they had joined the Union for the purpose of being adequately represented but were not rendered such assistance as they were entitled to; and that by all of this they were discriminated against in their seniority and employment rights. Clearly the thrust of these allegations is that the Union had maliciously and capriciously failed to represent these employees and had discriminated against them. Since the exclusive source of a union's representational authority and obligations is Section 9 of the NLRA, the law governing the issue is that developed under that Section. *Ford Motor Co., v. Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949).[4] Section 8 of the Act affords an even more obvious prohibition of the matters complained of in this case where, as here, the union's alleged improper representation results in alleged discrimination in respect to employment or seniority rights concerning which the Board has long provided remedies, increasingly so in the last several years. Since the alleged wrongful conduct of the union complained of in this case is arguably prohibited under the National Labor Relations Act, the National Labor Relations Board and not the state courts has exclusive jurisdiction to adjudicate the issues. *San Diego Bldg Trades Local 2020 v. Garmon*, 359 U.S. 236 (1959).

First, as to the jurisdiction of the Board to afford relief under Section 9 of the Act, the *Huffman* and *Campbell* cases, cited above, demonstrate that under Section 9 (a) of the Act each and every bargaining representative is obligated to represent all members of a unit fairly, nondiscriminatorily and in good faith. Enforcing this policy, the National Labor Relations Board has undertaken the task of policing the conduct of bargaining representatives by withholding or revoking certifications of unions that

[4] The complaint in both of the cited cases closely paralleled the one in the instant case, except that the former also stated a cause of action under the Selective Service Act of 1940.

discriminate hostilely against any segment of the bargaining unit, under the discretionary authority vested in the Board by Section 9. *Larus & Bro. Co.*, 62 NLRB 1075; *Hughes Tool Co.*, 104 NLRB 318; *Pittsburgh Plate Glass Co.*, 111 NLRB 1210; *A. O. Smith Corp.*, 119 NLRB 621. Thus, in *Larus & Bro.* the Board said:

> "We have conceived it to be our duty under the statute to see to it that any organization certified under Section 9 (c) as the bargaining representative acted as a genuine representative of all the employees in the bargaining unit."

And in *Hughes Tool Co.*, in language appropriate to the instant case, the Board stated:

> "Discrimination in the performance of the duties of the representative designed to deny equal treatment to those of the minority is to subvert the privilege and rights granted by the statute. . . . We believe it is also clear that the presentation and adjustment of grievances is an activity which is subject to this requirement of non-discriminatory representation by the certified union."

Second, it is clear that the union's conduct in this case, allegedly involving as it did discrimination in employment, is also a subject matter of remedy under Section 8 of the Act, particularly Sections 8 (a)(1) and 8 (a)(2) as against an employer involved in the discrimination and Sections 8 (b)(1)(A) and 8 (b)(2) as against the union so involved. In *Spielberg Mfg. Co.*, 112 NLRB 1080 and more recently in *Gateway Transportation Co.*, 137 NLRB No. 186 (decided July 1, 1962), involving the identical arbitration procedure as in the instant case, the Board took jurisdiction to remedy alleged discrimination in employment resulting from improper and discriminatory application of the union's grievance and arbitration procedure. More recently, on August 20, 1962, the General Counsel of the National Labor Relations Board issued a complaint charging a union with racial discrimination in refusing to proc-

ess a Negro employee's grievance. *Hughes Tool Co.*, 23-CA-1432.

The Board and the General Counsel having taken action in respect to complaints of the same nature as that made against the union here, it must be concluded that the subject matter is within the exclusive competence of the Board and that the state courts are without jurisdiction. This Court has already consented to review an analogous issue in *Smith v. Evening News*, cert. granted 7 L ed 2d 793 (1962) (No. 89, 1961 Term). The *Evening News* case, like the present one, involves a question of whether the state court has jurisdiction over a suit for damages for breach of a collective bargaining agreement where the action complained of also constituted an unfair labor practice in violation of the National Labor Relations Act. The issue here then would seem to be of equal importance, particularly where in addition it involves an application of Section 301 and the rejection of decisions of this Court which have established a national labor policy contrary to the pronouncements of the court below.

III

Even if it be assumed that the Labor Board and the state courts might have concurrent jurisdiction in the instant case, it nevertheless is incumbent upon the state court to apply federal labor law, and its failure to do so in a 301 type suit constitutes an additional compelling reason for the granting of this writ.

Section 301 is concerned with the enforceability of agreements between labor organizations and employers or between labor organizations themselves. The instant case involves that very subject matter. Thus, the complaint initiating these proceedings sought to enjoin the enforcement of the award of a grievance committee, rendered pursuant to a collective bargaining agreement and based on an interpretation thereof, on the ground (among others) that the decision was arbitrary, in violation of that agreement, and deprived respondents of their rights thereunder. Dur-

ing trial below, respondents' counsel stated: "Our only issue is whether or not their decision is in violation of this contract." (R. 268-269). Moreover, the court below, in rejecting petitioner's argument that the subject matter of the suit was preempted by the National Labor Relations Act, pointed to Section 301 as supporting the view that "the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem." It designated the case as "simply an action to construe and enforce a contract." Accordingly, the case must be viewed as one within the purview of Section 301 and therefore governed by federal law. *Atkinson* v. *Sinclair Refining Co.*, 8 L ed 2d 462 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 7 L ed 2d 593 (1962).

Furthermore, the fact that the case was brought by individual employees, who under federal court decisions* could not have maintained such a suit in the federal courts, neither takes the case out of the purview of Section 301 nor dispenses with the requirement that federal law be applied. For the requirement of *Lucas Flour* that federal law be applied by the state courts in cases of a kind covered by Section 301 is based not on the precise jurisdictional boundaries of Section 301 but on the overriding need for uniformity, dictated by the national labor policy, in terms of the negotiation, administration and interpretation of collective bargaining agreements. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). A contrary holding would require parties to so formulate their agreements as to satisfy two conflicting systems of law, the very requirement that Congress and this Court saw fit to avoid. The large number of suits brought by individuals on the basis

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* *Schatte* v. *Stage Employees & Moving Picture Machine Operators*, 84 F.Supp. 669 (S.D. Calif. 1949), aff. 182 F2d 158, cert. den. 340 U.S. 827; *Holman* v. *Industrial Stamping & Mfg. Co.*, 142 F.Supp. 215 (E.D. Mich. 1956); *Evening Star Newspaper Co.* v. *Columbia Typographical Union*, 141 F.Supp. 374 (D.D.C. 1954), aff. 233 F2d 697 (D.C. Cir. 1956); *Allen* v. *Teamsters, Local 820*, 185 F.Supp. 492 (D.C.N.J. 1960); *Copra* v. *Suro*, 236 F2d 107 (1st Cir. 1956).

of violations of collective bargaining contracts demonstrates that the area of potential conflict is indeed enormous. For such suits will obviously affect the law of collective bargaining to the same extent as suits brought by the parties themselves, and in so doing, will "strike at the very core of federal labor policy". (*Lucas Flour, supra,* 7 L ed 2d at 600). For that reason, we assume, this Court in *Lucas Flour* called for the application of federal law "in suits *of a kind* covered by Section 301" and "*in the areas* covered by the statute" (7 L ed 2d 598, 599), rather than "in suits over which federal courts may assume jurisdiction under Section 301."

Thus, the failure of the court below to apply federal law contravenes the clear mandate of the foregoing decisions and the intent of Congress, and frustrates the continuing attempt of this Court to provide labor and management with a cohesive body of law to govern their relations.

IV

As previously noted, the federal courts have uniformly held that individual employees may not maintain suits under Section 301 in the federal courts, since Congress has made it plain that Section 301 was to cover solely suits between a union and an employer or between unions themselves.[7] The question is therefore raised whether the national labor policy, including Section 301 itself, forbids individual employees from maintaining similar suits of a kind covered by Section 301 *in the state courts.* We submit that it does.

This Court has consistently held that where state courts have been called upon to enforce federally created rights they could not apply state laws, whether "procedural" or "substantive", that were incompatible with the policy underlying the federal statute. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); *Brown* v. *Gerdes*, 321 U.S.

[7] See cases cited, *supra*, fn. 6.

178 (1944); *Garner* v. *Teamsters*, 346 U.S. 485 (1953); cf., *Angel* v. *Bullington*, 330 U.S. 183 (1947). Particularly is this true where, as here, the federal rule of law that is inconsistent with that of the state is contained in the very statute that provides the federal substantive law to be applied in the case and is made an integral part thereof. Cf., *Atlantic Coast Line R.R.* v. *Burnette*, 239 U.S. 199 (1915); *Engel* v. *Davenport*, 271 U.S. 33 (1926).

Section 301 permits suits only "between an employer and a labor organization" or "between any such labor organizations". It further provides: "Any such labor organization may sue or be sued as an entity and *in behalf of the employees whom it represents* . . . ." It is thus made abundantly clear, by the statute itself, that employees' rights under collective bargaining agreements are to be enforced, not by them individually, but by their representative who is party to such agreements. That Section 301 is not merely jurisdictional but is the source of federal substantive law is by now axiomatic. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Viewed in this light, the Section not only narrows the jurisdiction of federal courts to cases between the actual parties to an agreement but states, as a matter of policy, that insofar as difficulties arise under such agreements they are to be settled by the parties through the grievance procedure chosen by them—thus affording the parties the opportunity to administer the contract without outside harassment. The state law of Kentucky, permitting individual employees to skirt and attack decisions arising out of the grievance procedure by maintaining suits for breach of these agreements, encroaches upon the foregoing policy and must, therefore, give way. The states must apply the federal law. *Atkinson* v. *Sinclair Refining Co.*, *supra*; *Local 174, Teamsters* v. *Lucas Flour Co.*, *supra*.

The decision below, permitting the individual employees to sue, presents other points of conflict with national labor policy. Thus, individual employee suits for breach of collective bargaining contracts are inconsistent with the long-standing federal policy that collective bargaining on behalf

of all the employees is the task and duty of the union alone and that any activity which is incompatible with this exclusive representation constitutes a violation of the National Labor Relations Act. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Moreover, the threat of such suits would have an adverse effect upon the very process of negotiation between the union and the employer. A union could no longer feel flexible enough to negotiate agreements which, while advancing the overall interest of the bargaining unit, might in some incidental respect adversely affect some members of the unit. In addition, if individuals who are prevented from maintaining Section 301 suits in the federal courts are allowed to do so in state courts, they would be encouraged to shop for the favorable state forum.[8] And because it is unlikely that such state court suits could be removed to the federal courts (28 U.S.C. Section 1441) the state, rather than federal, courts would anomalously become the chief architects of the substantive law to be developed under the federal Act.

It would not do to contend that the adoption of the argument presented here would deprive state courts of "jurisdiction" previously enjoyed by them, an effect Section 301 was not to have had. For the foregoing would no more limit state "jurisdiction" than did this Court's decision in *Atkinson*, or *Lucas Flour*, or the *Steelworkers* cases, or, for that matter, *Lincoln Mills* itself.[9] Nor can it be argued that the result contended for would leave individual em-

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[8] Some states permit individuals to sue for breach of a collective bargaining agreement while others forbid it. See *Falsetti* v. *Local 2026, United Mineworkers*, 46 LRRM 2389 (Pa. S. Ct. 1960) and cases cited in fn. 20.

[9] It should be noted that the instant issue is similar to another that has recently caused this Court some concern—whether the Norris-LaGuardia Act, prohibiting federal courts from enjoining strikes in breach of contract in cases under Section 301, similarly restricts the state courts. *Charles Dowd Box Co.* v. *Courtney*, 7 L ed 2d 483 at 491, fn. 8 (1962); *Sinclair Refining Co.* v. *Atkinson*, 8 L ed 2d 440 (1962) (dissenting opinion).

ployees without remedy. For they remain free to maintain suits against their representative where the latter hostilely discriminates against them or wrongfully deprives them of their internal union rights. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Larus & Bro.*, 62 NLRB 1075; *Gonzales* v. *Machinists*, 356 U.S. 617 (1958). They may also maintain suits to protect their "uniquely personal" rights of employment arising from their separate hiring contracts, as distinguished from rights that are fundamental to the collective bargaining agreement and affect the entire bargaining unit, as in this case. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). Moreover, they would continue to receive the full protection of the National Labor Relations Act and the Labor Management Reporting and Disclosure Act of 1959.

For these reasons, the issue presented here, which is of substantial importance in terms of the administration of the Act and federal-state relations and which has not as yet been determined by this Court, commends itself to review at this time.

V

Petitioner further submits that, as to each and every ground relied on by the state court for setting aside the award of the Joint Conference Committee, the decision below was clearly inconsistent with the national labor policy as established by decisions of this Court:

1. The holding of the state court was primarily based upon its view that Article 4, Section 5 of the collective bargaining agreement had no application to the grievance submitted by the E & L employees, that in any event the interpretation of that provision by the Joint Conference Committee was wrong, and that the said provision could not extend to employees other than those employed by Dealers. In short, the court undertook to interpret the contract *de novo* and found itself in disagreement with the interpreta-

tion of the Joint Conference Committee, finding the latter to have been "erroneous." On that basis, the court held that the grievance was not arbitrable and that the award was arbitrary.

In so doing, the court failed to adhere to the many decisions of this Court establishing the standards of review to be exercised by the courts in cases involving the enforcement of grievance provisions of collective agreements. *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). These cases, now landmarks in the Section 301 area of labor law, direct the courts to avoid deciding grievances on their merits, thus promoting the settlement of labor disputes through means chosen by the parties to collective bargaining agreements. Thus, they direct the courts to uphold the arbitrability of a grievance so long as the claim "on its face is governed by the contract" (363 U.S. at 568), or "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute". (363 U.S. at 582-583). Moreover, these cases stand for the proposition that once an award has been rendered by an arbitrator "the courts have no business overruling him because their interpretation of the contract is different from his." (363 U.S. at 599).

Yet, in the instant case, the state court found that the dispute was not arbitrable in the face of a contract provision calling for the submission to the grievance procedure of "any controversy." Further, it undertook to interpret both the substance and scope of the contract on its own, and set the award aside precisely because its interpretation of the contract was different from that of the Committee chosen by the parties to settle their disputes. This manifest inconsistency with decisions of this Court should not be permitted to stand.

2. Moreover, in deciding that Article IV, Section 5 of the

Dealers contract could not cover the E & L employees because the Union had signed a separate contract with each employer, the court not only placed an interpretation upon that provision that is contrary to its plain meaning and the interpretation of the parties themselves but failed to grasp the significance of multi-employer bargaining units. The purpose of bargaining on that basis is not only to permit equalization of power between labor and management, but to assure that all employees within a certain area or industry work under the same rates, working conditions, rights and obligations so as to minimize threats to peaceful relations in the area or industry involved. The validity of such bargaining units has been expressly recognized and protected by decisions of both this Court and the National Labor Relations Board. *NLRB* v. *Truck Drivers Local 449* (*Buffalo Linen Supply Co.*), 353 U.S. 87 (1957); *Retail Associates, Inc.*, 120 NLRB 388; *Balaban & Katz*, 87 NLRB 1071. By contrast, the narrow and technical view of the court below that parties within such a unit must be deemed to have entered into "separate" contracts has the effect of fragmentizing the multi-employer bargaining unit in contravention of the national labor policy. A similar attempt to break up or weaken the effectiveness of the over-all unit, when undertaken by private parties, would not receive the protection of the Act and would justify counterveiling defensive measures by members of the unit. *Buffalo Linen Supply Co., supra.*

3. Finally, the court below expressed the view that the "erroneous" decision of the Committee must be viewed against a background of what the court believed was inadequate and deceitful representation of the Dealers employees on the part of the Union, which tainted the award and violated "natural justice." Thus, the court emphasized as one of the bases of its decision that the Union had represented two antagonistic interests, and had pursued a "spurious grievance" and that it did so because its own "power and influence . . . stood to be enhanced" by the award of the Committee. But in making these findings, the

court did not follow, or even advert to, the law developed under Section 9 of the Labor Management Relations Act by decisions of this Court, which law alone governs the extent of a union's authority and rights as a representative. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949); cf., *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive F & E*, 323 U.S. 41 (1957); *Conley* v. *Gibson*, 355 U.S. 41 (1957). Thus, the standard promulgated by these cases to test a union's representational efforts under the Act is whether the union's conduct was motivated by "hostile discrimination" or, rather, by an honest desire to protect the interests of all the employees it represents. Yet the complaint did not allege hostile discrimination, the record herein would not support such a finding and the court did not so find.

It is evident, moreover, that the law as developed by this Court would require a result different than that reached by the state court. Underlying much of that court's opinion was its obvious dislike of any contractual action that deprives a minority of employees of certain rights, particularly when accomplished by means of dovetailing seniority. While this protective attitude of the court is understandable, it fails to take into account one of the facts of life of collective bargaining, namely that a union must often represent antagonistic interests within a bargaining unit. Especially is this so where, as here, a merger is effected which seriously jeopardizes the seniority of a substantial number of employees represented by the union. While, in such cases, the union is often blamed by the adversely affected group for having caused its injury, the union is merely performing the unwelcome task of deciding which of two employee groups should suffer as a result of employer changes in operation over which the union has no control.[10]

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[10] It is not at all unlikely that if, in the instant case, the Joint Committee's decision had favored the Dealer's employees, the E & L employees would have brought a similar suit.

And in these circumstances, so long as no hostile discrimination is shown, a union may properly advance the interest of one group to the disadvantage of another. In *Ford* v. *Huffman* this Court expressed that view in the following terms:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.
>
> . . . . . .
>
> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. (345 U.S. at 337-338).

Moreover, in both the *Ford* v. *Huffman* and *Campbell* cases, this Court upheld similar contractual adjustments of seniority rights—always at the expense of a certain group of employees—over contentions that such contracts were "arbitrary" and that the bargaining representative exceeded its authority by so contracting. See also *Hardcastle* v. *Western Greyhound Lines*, 303 F2d 182 (9th Cir. 1962); *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959). The federal courts have similarly sanctioned decisions of the ICC,[11] the CAB[12] and bipartisan adjustment boards under the Railway Labor Act[13] to dovetail the seniority of employees affected by mergers and other contractual adjustments of their employment status.

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[11] *U.S.* v. *Lowden*, 308 U.S. 225 (1939); *Railroad Labor Executive Ass'n* v. *U.S.*, 339 U.S. 142 (1950).

[12] *Kent* v. *CAB*, 204 F2d 263 (2d Cir. 1953).

[13] *Starke* v. *N.Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950); *Fagan* v. *Pa. R.R.*, 173 F.Supp. 465 (M.D. Pa. 1959).

Finally, the reliance of the court below upon its own view of "natural justice" is obviously misplaced. The comprehensive panoply of federal statutes governing labor relations leaves no room whatever for such subjective and loosely defined concepts. The validity of the union's conduct, as it affected the grievance decision, should have been tested exclusively by the standards established by this Court in the line of decisions headed by *Ford* v. *Huffman*.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

DAVID PREVIANT,
511 Warner Building
Milwaukee 3, Wisconsin

HERBERT S. THATCHER,
DAVID S. BARR,
1009 Tower Building
Washington 5, D.C.

RALPH H. LOGAN,
506 West Jefferson Street
Louisville 2, Kentucky
Counsel for Petitioner

APPENDIX A

ORDERS—KENTUCKY COURT OF APPEALS

FALL TERM, DECEMBER 1, 1961

JEFFERSON CIRCUIT COURT

C. W. MOORE, Individually and for and on behalf of members of the Class, *Plaintiffs*

Vs: No.....

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA AND DEALERS TRANSPORT COMPANY, *Defendants*

TEMPORARY INJUNCTION

The above styled cause coming on to be heard this 29th day of November, 1961, on appeal to the Court of Appeals of Kentucky from an order of the Jefferson Circuit Court denying the temporary injunction to the plaintiff herein and the Court having considered the record and heard the argument of counsel herein and being advised;

It is hereby ORDERED AND ADJUDGED that the defendants, Local Union No. 89, General Drivers, Warehousemen, Helpers and Dealers Transport Company, and each of them, be and they are now and hereby enjoined from putting into effect or enforcing the decision of the Automobile Transporters Joint Conference Committee, which reads as follows:

"LOCAL UNION NO. 89 (LOUISVILLE) VS. DEALERS TRANSPORT CO., AND E & L TRANSPORT COMPANY OF KENTUCKY.

Re: Request of Employees R. L. Lewis and Howard Baker on behalf of themselves and other former employees of E & L Transport Co. of Ky. as to their seniority

rights with Dealers Transport Co., because of the discontinuance of operations in Louisville by E & L Transport Co. of Ky.

DECISION: By unanimous vote the Committee held that in accordance with Article 4 and particularly sub-section 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the employees of E & L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).

1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky, maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers Transport Co. Men subsequently who came to Louisville from Memphis went to the bottom of the board at Dealers Transport Company and maintained their seniority for fringe benefits only.

2. This shall be accomplished within thirty (30) days. Copies of this de-

cision shall be posted on the bulletin boards at both companies.

And further that said temporary injunction shall be effective from this date until further orders of this court, on condition only that the plaintiff file a bond, with surety, in the amount of $50,000 with this court to pay such damages to the defendants, if any, as the said defendants may sustain by reason of this temporary injunction, if the court shall eventually decide that the plaintiff herein was not entitled to this temporary injunction.

It is further ORDERED and ADJUDGED that any action taken by the defendants herein to enforce the above set out decision shall be revoked and any employees who are members of the class of plaintiffs herein, who have lost their jobs by reason of said decision, shall be reinstated to their jobs pending further orders of the court.

November 29, 1961

/s/ ROBERT B. BIRD,
Judge

ORDERS—KENTUCKY COURT OF APPEALS

Fall Term, December 15, 1961

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, INDIVIDUALLY AND FOR
AND ON BEHALF OF MEMBERS OF THE CLASS, *Appellants*

VS:

LOCAL UNION NO. 89, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFERS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFERS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AND DEALERS TRANSPORT COMPANY, *Appellees*

ORDER GRANTING PERMANENT INJUNCTION

This day this cause came on for hearing on appeal and the Court having reviewed and reversed the decision of the Jefferson Circuit Court herein, IT IS NOW ORDERED that the temporary injunction granted by this Court on the 29th day of November, 1961, be made permanent.

And, IT IS FURTHER ORDERED that the injunction bond, executed by the appellants in the sum of $50,000.00, be and it hereby ordered cancelled, set aside and held for naught.

The opinion herein will be written and rendered at a later date.

Entered this 15th day of December, 1961.

/s/ ROBERT B. BIRD,
Chief Justice

RENDERED: February 13, 1962
MODIFIED: May 4, 1962

COURT OF APPEALS OF KENTUCKY

C. W. Moore, *Appellant*

Vs:

Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Et Al., *Appellees*

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH—FIRST DIVISION
HON. MACAULEY L. SMITH, JUDGE

OPINION OF THE COURT BY JUDGE PALMORE

AFFIRMING IN PART
REVERSING IN PART

This injunction suit brought as a class action by a member of a labor union questions the right of the union and the plaintiff's employer, Dealers Transport Company, to carry out the terms of a decision relating to job seniority rights. The decision in question was reached through the grievance procedure set forth in a contract between the union and the employer. The chancellor upheld the decision and denied relief.

Dealers Transport Company, of Memphis, Tennessee, and E & L Transport Company, of Detroit, Michigan, were competitors in the transportation of new automobiles and trucks from the Louisville assembly plant of the Ford Motor Company. With the development of multi-level or "piggy-back" railroad shipments they began to lose business, and Ford advised both companies that eventually there would be room for only one of them. Following discussions over a period of 1½ to 2 years it was agreed between Dealers and E & L that E & L would withdraw, leaving the Louisville field to Dealers. This arrangement does not involve the sale or transfer of any equipment, facilities, or other property, but an application has been

made to the Interstate Commerce Commission for the transfer to Dealers of E & L's authority to make "secondary" runs out of Louisville. For this transfer Dealers is to pay a nominal consideration covering the expense of the transaction. There was and is no agreement between the companies calling for a transfer of any employees from one to the other.

Because of the increased competition from both rail and water shippers, Dealers and E & L decided also that it would be advisable for each of them to retrench by drawing its operations closer to home. So, at the same time the application was made for a transfer of E & L's secondary authority out of Louisville to Dealers, two other applications were submitted to the I.C.C., as follows:

(1) To authorize the sale and transfer to E & L of Dealers' initial authority out of Lorraine, Ohio, along with physical assets such as tractors, shop equipment, and terminal facilities there located.

(2) To authorize the sale and transfer to Dealers of E & L's secondary authority to serve New Orleans and Shreveport, Louisiana, and Jackson, Mississippi.

It was emphasized in the testimony that each of these proposed transfers is separate, none being contingent on either of the others. All are pending before the I.C.C.

Most if not all of the labor forces at both Dealers and E & L are members of Local No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which in turn is "affiliated" with two autonomous but apparently interlocking organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the National Truckaway and Driveway Conference. For convenience we shall refer to these three organizations as the Local Union, the International, and the National Conference.

The Teamsters Union, as it is commonly called, has represented the employees of E & L and its predecessor in

business for over 20 years and has represented the Dealers employees since 1955 or 1956. The National Conference, in behalf of its member local unions, is the exclusive representative of the employees for purposes of collective bargaining, and its standard contract for the period March 1, 1961, to February 29, 1964, printed in booklet form, has been separately executed by Dealers and by E & L. In each instance the agreement is signed by the Local, the National Conference, and the employer, but not by the International as such.

The standard contract secures job seniority rights to the employees. These rights are established, broadly speaking, on a terminal or local rather than a company-wide basis. For example, Article 4, Sec. 1 says: "Terminal seniority shall prevail at all times except as provided for in Article 4, Section 6, Subsection (b)2." The latter subsection provides that if a branch or terminal is closed or partially closed and its work transferred to another branch or terminal an employee transferring from one to the other shall go to the bottom of the seniority board for purposes of job selection but shall exercise his company seniority for lay-off purposes and all other contract benefits. When a new branch or terminal is opened a new seniority board is established, and an employee who transfers to it from another location loses his seniority rights at the old terminal at the end of 2 years. (In the case of Dealers, which established its Louisville terminal in 1955, there was a special exception under which the first 50 employees transferring from Memphis were permitted, for some reason not disclosed in the record, to carry with them the original seniority dates.)

The standard contract (Article 7, Section 2) further provides a grievance procedure under which "disputes" shall first be taken up between the employer and the local union involved. On their failure to agree the dispute is taken before a "Local Joint Committee" composed of both union and management representatives. If this committee cannot resolve the controversy it may be appealed to a body called

the Automobile Transporters Joint Conference Committee (hereinafter called the Detroit committee), which consists of both labor and industry-wide management representatives. When this panel is unable to agree the matter must be submitted to further arbitration.

Though E & L is still operating in Louisville, in August of 1961, when this controversy developed, a shift of business from E & L to Dealers obviously was taking place. As E & L began to drop its men employment at Dealers increased. Some of the E & L men were taken on by Dealers, but as the layoffs at E & L accelerated it was inevitable that there would be no room at Dealers for any more. Then it was that two of the former employees of E & L filed with the Local Union a grievance claiming that they and other displaced employees of E & L were entitled to employment by Dealers through a merger of the respective seniority list of the two companies.

Without taking the question up with Dealers (thereby omitting the first step in the grievance procedure), the Local Union submitted it to the Local Joint Committee, where at the recommendation of one of its members, Paul Priddy, president of the Local Union, it was "deadlocked," meaning that the Local Joint Committee decided to pass the problem to the Detroit committee for solution. The Dealers employees were disturbed at this turn of events, but their apprehensions were allayed by assurances from Mr. Priddy's assistant that they were protected by their terminal seniority rights and were not in any trouble. Three of these men attended the Detroit hearing, where they expected their interests to be represented and upheld by Mr. Priddy. But, like the innocent little oysters who took the famous walk with the walrus, they were mistaken, for, according to the testimony of Dealers' personnel manager, when Mr. Priddy had suggested to the Local Joint Committee that the grievance be "deadlocked" and sent to Detroit he remarked "That he knew Mr. Hoffa's thinking on matters of this nature and that these men were going to be sandwiched in." (Mr. Hoffa was president of the International,

chairman of the National Conference, and chairman of the Detroit committee.)

When the grievance was called on the docket of cases being heard before the Detroit committee, Mr. Priddy, who also was one of the members of that tribunal, vacated the bench, as was customary for the committee members to do when their own cases were involved. At this time he informed the three Dealers employees, to their surprise and consternation, that, he was going to take a stand in favor of merging the Dealers and E & L seniority boards. Representing the Local Unions, he thereupon proceeded to state the grievance to the Detroit committee and successfully recommend its solution on that basis. The decision of the Detroit committee, announced a few days after the hearing, was to the effect that the seniority registers of Dealers and E & L at Louisville were to be merged within 30 days.

E & L's Louisville terminal evidently is older than that of Dealers, which was established in 1955. This means that by and large the E & L employees will have greater seniority in the event the merger of seniority boards stands. For example, even with the right of the first 50 Dealers men who came from Memphis in 1955 to retain their original Memphis hire-in dates, out of the first 200 men listed on the new board only 58 will be Dealers Men. As a result, on November 25, 1961, just before this suit was filed, Dealers laid off 96 of its Louisville employees who were displaced by former employees of E & L.

The decision of the Detroit committee is being attacked in this case upon the grounds that it is so unjust as to imply fraud, or, to put it another way, that it is arbitrary and therefore subject to judicial inquiry and disposition. Specifically, the court is asked to enjoin the Local Union, the International (though it was not, as such, a party either to the contract or the grievance proceedings), and Dealers from carrying into effect the decision of the Detroit committee. Affected E & L employees were made defendants by amendment.

The question has been raised as to the amenability of International to process through service on the president of its affiliated Local Union. Since, however, International was not a party to the contract or the grievance proceeding we believe its connections with the controversy is insufficient to warrant any relief against it. Hence the judgment of dismissal as to International was correct and it is unnecessary to consider the jurisdictional point.

Appellant and his fellow-employees of Dealers rely heavily on one of the provisions of a special rider attached to the contract between Dealers and the Local Union. It reads as follows:

"The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."

This provision, or its progenitor, grew out of a controversy in Memphis in 1955, when the Memphis employees, during a slack period, sought to displace drivers of loads passing through Memphis from other points of origin. We agree with the chancellor that it is not dispositive of the problem that arose in this case. The real question was whether the E & L drivers are entitled to be employees of Dealers, and the Detroit committee ruled, in effect, that they were. If that is correct, then the rider provision had no more application to their employment that it would have to the hiring of a new employee from any other source.

The contract provision (Article 4, Section 5) on which the Detroit committee based its ruling to the effect that the E & L employees are entitled to employment by Dealers reads as follows:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

It is the theory of the E & L employees that the transfer to Dealers of E & L's secondary runs out of Louisville constitutes an absorption of business and that under this clause Dealers is required to absorb the affected employees as well as the business. We cannot find any such meaning in the clause. It deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure.

It must be remembered that even though Dealers and E & L have signed practically identical contracts with the same union, still they are separate agreements. These two employers, their respective employees, and the union are not one big happy family living under the same tent. As we see it, the displaced E. & L. employees can have no greater right to employment by Dealers than they would possess if they belonged to a different union, or to no union at all. Note, for example, that the contractual provision just quoted mentions "the *Unions* involved." (Emphasis added.) Suppose that the E & L men were represented by a different union. Would they have any rights under this contract between Dealers and another collective bargaining agent? Surely not. Nor would it be possible for them to initiate a grievance directed toward a company with which they had never enjoyed as employer-employee relationship. They are strangers to the Dealers contract, and it was not made for their benefit.

Since Article 4, Section 5, had no application under the circumstances of this case we are of the opinion that the question was not arbitrable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially. See discussion in *Harbison-Walker Refrac. Co.*

v. United Brick & C. Wrks., Ky. 1960, 339 SW 2d 933. But even if it were otherwise, we find the decision of the Detroit committee to be so erroneous, and made under such circumstances, that it was arbitrary.

Before proceeding further let us clarify the position of Dealers, the employer, in this matter. It is neutral. Its relations with its employees have been highly satisfactory, and the year ending July 1, 1961, was its best year to date for efficiency as to accidents, cargo-damage, and the like. It has recognized all along that the real controversy here was within the union itself. It feels bound to honor the contract and the "decisions of all agents to the employees who legally work for us." At Detroit it took the position that it was up to the union to decide what to do with the employees. In its November 25 letters to the 96 displaced employees it specifically advised them that their dismissal was "necessary due to Union action whereby the decision was rendered" by the Detroit committee requiring absorption of the E & L seniority list. It seems clear that Dealers was scarcely a real party in interest to the grievance proceeding. The actual antagonists were the E & L men on the one hand and the Dealers men on the other, all union members.

Representing these two antagonistic interests was the same union. It is useless to say that the union did not "represent" anyone in the grievance proceeding. Common sense verifies the testimony in this case to the effect that the men looked to and depended on their union officials to espouse their rights. Otherwise, what legitimate business does a union have in such a proceeding. It would be equally unrealistic to hold that the Dealers employees had representation before the Detroit Committee through the presence of three of their number who made the trip with Mr. Priddy and his assistant. As one of them said, he was only a shop steward and was not prepared or qualified to make a presentation to the national grievance panel. So we have a situation in which two antagonistic interests were represented by the same advocate. This of itself is enough to

destroy the traditional presumption in favor of an arbitration award. Moreover, we cannot overlook the fact that even the advocate must have had an interest of its own, in that the power and influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines. Under these particular circumstances the solution of the controversy under the cloak of a spurious "grievance" against a virtually disinterested employer simply will not bear careful scrutiny, and when we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice. Any other conclusion would reduce these employees to the status of pawns instead of free men. So, even though it be considered that the Detroit ruling was made pursuant to Article 7, Section 2(d) of the contract, providing for arbitration of all questions of contract interpretation, it still cannot stand. This result is not in conflict but is consistent with the principles stated in *Smith v. Hillerick & Bradsby Co.*, Ky., 1952, 253 SW 2d 629.

The most difficult question in this case is whether the complaint of the suing employee is within the exclusive jurisdiction of the National Labor Relations Board.

Section 10(a) of the Taft-Hartley Act, 61 Stat. 146 (1947), 29 USCA § 160(a), empowers the NLRB "to prevent any person from engaging in an unfair labor practice . . . . . affecting commerce," subject to certain exceptions. Unfair labor practices are defined in Section 8 of the Act, 29 USCA § 158. An examination of the latter section convinces us that the controversy in this case does not involve an unfair labor practice. Section 8 (b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)." However, the latter subsection is confined to discrimination the purpose of which is "to discourage membership in any labor organization." Obviously, this is not such a case. Whatever may have been the end result of the actions of the union and the employer,

they were not motivated by any of the illicit objects and designs set forth in Section 8 of the Act as constituents of an unfair labor practice. As we see it, what we have here is not a labor dispute, but simply an action to construe and enforce a contract under which the complaining employee and his fellows have certain rights of tenure. By entertaining that action the courts of this state neither intend nor claim to exercise any jurisdiction in the field of national labor policy, which has been delegated by Congress exclusively to the NLRB. We find inferential support in that Congress has expressly authorized the federal courts to adjudicate suits for violation of labor contracts (29 USCA § 185), which means that the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem.

We recognize that if an activity is "arguably" subject to the Act "the States as well as the federal court must defer to the exclusive competence" of the NLRB. *San Diego Unions v. Garmon*, 1959, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775. However, we are not convinced that the question in this case is reasonably arguable.

Insofar as it dismissed the action against the International union the judgment is affirmed. Otherwise it is reversed with directions that a judgment be entered in accordance with this opinion.

Judges Moremen and Williams dissenting.

ORDERS—KENTUCKY COURT OF APPEALS

Winter Term, February 16, 1962

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, Individually, and for and on behalf of members of the class, *Appellants*

Vs:

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND DEALERS TRANSPORT COMPANY, *Appellees*

ORDER MODIFYING THE ORDER GRANTING A PERMANENT INJUNCTION UNDER DATE OF DECEMBER 15, 1962.

The Court having this day rendered its opinion affirming in part and reversing in part this appeal from the Jefferson Circuit Court, now orders and directs that the order granting a permanent injunction dated December 15, 1962, be modified to conform to the opinion of the Court this day delivered.

IT IS SO ORDERED.

Entered this 13th day of February, 1962.

/s/BRADY M. STEWART
Chief Justice.

ORDERS—KENTUCKY COURT OF APPEALS

Spring Term, May 4, 1962

MOORE, INDIV., ETC.,

VS.

LOCAL UNION No. 89, ETC.
et al. Jefferson

The Court being sufficiently advised, the opinion delivered herein is modified on its face, and it is considered that the appellees' petition for rehearing be and the same is hereby overruled.

APPENDIX B

CR 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. Moore, Individually and for and on Behalf of Members of the Class, *Plaintiffs*

v.

Local Union No. 89, *et al.*, *Defendants*

ORDER

This action having been tried to the Court on November 18 and November 24 on plaintiffs' motions for a temporary injunction, and the Court having heard the arguments of counsel, and being advised,

IT IS ORDERED as follows:

1. That the motion to quash the service of summons on the defendant, "International Brotherhood of Teamsters, Chauffeurs, etc.," served November 18, 1961, by delivering a copy to Paul Priddy, President of Local Union No. 89, be and it is sustained.

2. That the plaintiffs' motion for a temporary injunction against the implementation of the decision or arbitration award of October 18, 1961, by the Automobile Transporters Joint Conference Committee in Detroit be and it is overruled.

NOVEMBER 24, 1961.

/s/Macauley L. Smith, *Judge*

MEMORANDUM OPINION

In this case, the employer, Dealers Transport Company, was engaged as a competitor of E & L Transport Company in the transportation of new cars and trucks from the Ford Motor Company, Louisville assembly plant. Some time in the Spring of 1961 Ford announced (probably because of

the increasing number of its vehicles being transported piggy back by rail carriers) that in the future it would deal only with one of the two. Negotiations followed between the two truckaway carriers, and they determined that, subject to ICC approval, Dealers Transport would take over E & L's routes out of Louisville and E & L would take over certain operations of Dealers in Ohio and out of Memphis.

A grievance by two employees of E & L, who anticipated losing their jobs, was filed with Local 89 which represented the (Louisville) employees of both employers. Without decision in Louisville, these grievances were forwarded to Detroit for hearing by the Automobile Transporters Joint Conference Committee. Plaintiffs complained that up until a few moments of the hearing in Detroit they were led to believe by the President of Local 89, Paul Priddy, and his chief agent (with respect to these two employers) Les Atterbury, that the position of Dealers Transport employees would be furthered by them before the Joint Conference Committee in Detroit; whereas, in fact, Priddy at the hearing made a statement favoring "sandwiching in" of the E & L employees into the Dealers Transport seniority list with the contemplated effect that a number of the latter will lose their seniority and may lose their jobs.

The Joint Conference Committee in Detroit is composed of equal representation of the representatives of labor and of industry, and no contention is made that the pertinent facts with respect to this proposed "merger" or "absorption" of routes were not truthfully disclosed to the Committee. While plaintiff and those whom he represents were disappointed in the action of their Local 89 representatives, there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented.

This Court conceives that the provisions of Article 4, Section 5, Page 14, in the printed Agreement effective March 1, 1961, governed this state of facts instead of

Article 4, Section 6, subsection 2 on page 17, of said printed Agreement. This Court cannot follow counsel for plaintiff's argument that the paragraph on page 2 of the four page rider to said contract, providing:—

> "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."—

is determinative of the controversy. When the E & L employees become employees of Dealers Transport, they will be Louisville domiciled employees of the employer, and this Court believes their rights are governed by Article 4, Section 5, mentioned above, and that a binding determination of the controversy was made in Detroit on October 18, 1961.

NOVEMBER 24, 1961

/s/MACAULEY L. SMITH, *Judge*

C.2 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. MOORE, *Plaintiff*

v.

LOCAL UNION No. 89, *et al.*, *Defendants*

JUDGMENT

The parties by counsel having agreed that the within action might be submitted in chief to the Trial Court on the proof introduced herein November 18 and 24, 1961, on motion for temporary injunction together with brief additional testimony of Mr. Stoval heard this day, and the Court having considered all of said evidence, for the reasons stated in Memorandum Opinion filed herein on November 24, 1961,

IT IS ORDERED AND ADJUDGED as follows:

1. That plaintiff's motion for a permanent injunction against the implementation of the decision of the Automobile Transporters Joint Conference Committee in Detroit on October 18, 1961, be and it is overruled.

2. That plaintiff's complaint as amended be and it is dismissed.

3. That defendants recover of plaintiff their costs herein expended.

4. That the order of temporary injunction signed herein on November 29, 1961, by Chief Justice Bird be and it is continued in effect pending the contemplated appeal herein.

DECEMBER 4, 1961

/s/ MACAULEY L. SMITH, *Judge*